

SMMP: Fighting Crime in Europe Keynote Address

The United States Constitution and the Ethos of Prosecutorial Independence

Jessica de Grazia

The five inter-related obstacles to building fair and effective prosecution agencies

1. Insufficient funding
2. Inadequate legal tools
3. Cumbersome rules of criminal procedure that unreasonably delay the disposition of cases
4. Difficulties in recruiting and retaining the best investigators and lawyers
5. Lack of support for the principle of prosecutorial independence

The US Justice Department

Annual Budget, \$46 billion; over 100,000 employees



Asset forfeiture enables prosecutors to substantially self finance specialist prosecutions



The Manhattan District Attorney with a facsimile of a check for \$175 million payable to New York City.

Prosecutorial Independence

The foundation stone of an effective prosecution system, rule of law, and a fair society.



The Constitution

We the People

of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common Defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America.

Article I.

SECTION 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

SECTION 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Bill of Rights

Congress OF THE United States,

*begun and held at the City of New York, on
Wednesday, the fourth of March, one thousand seven hundred and eighty nine.*

The Conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution:

Resolved, by the SENATE and HOUSE of REPRESENTATIVES of the UNITED STATES of AMERICA in Congress assembled, two thirds of both Houses concurring. That the following Articles be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States; all, or any of which articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution, viz.

Articles in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the Original Constitution.

Article the first After the first enumeration required by the first Article of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which, the proportion shall be so regulated by Congress, that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons, until the number of Representatives shall amount to two hundred, after which, the proportion shall be so regulated by Congress, that there shall not be less than two hundred Representatives, nor more than one Representative for every fifty thousand persons. [Not Ratified]

Article the second No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened. [Not Ratified]

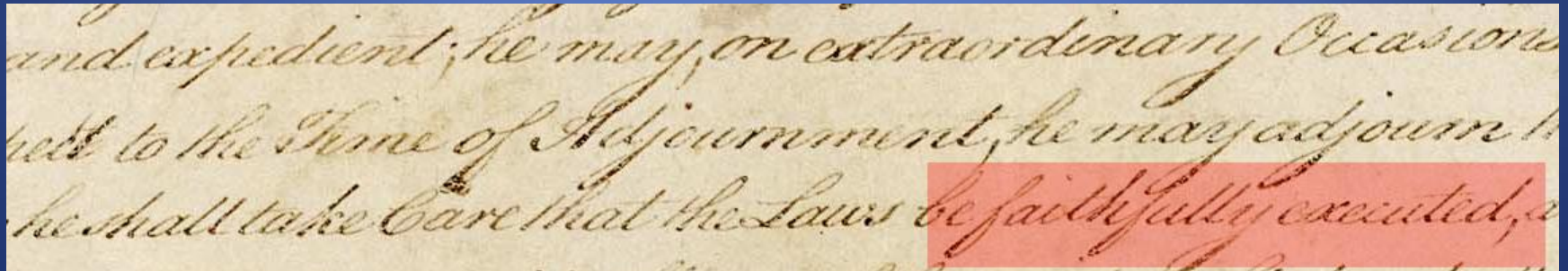
Article the third Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article the fourth A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Article the fifth No Soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be pre-

Article II of the Constitution

“The executive power shall be vested in a President of the United States of America... **he shall take Care that the Laws be faithfully executed .”**



and expedient; he may, on extraordinary Occasions
held to the Time of Adjournment, he may adjourn to
he shall take Care that the Laws be faithfully executed, and

The Senate Judiciary Committee, 1925



The Prosecutor's job is to do what is right

“The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty **whose obligation to govern impartially is as compelling as its obligation to govern at all.**”

- **BERGER V. UNITED STATES, 295 U. S. 78 (1935)**

Preamble to the Constitution

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and **secure the Blessings of Liberty to ourselves and our Posterity** do ordain and establish this Constitution of the United States of America.”

The First Amendment guarantees liberty of conscience

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

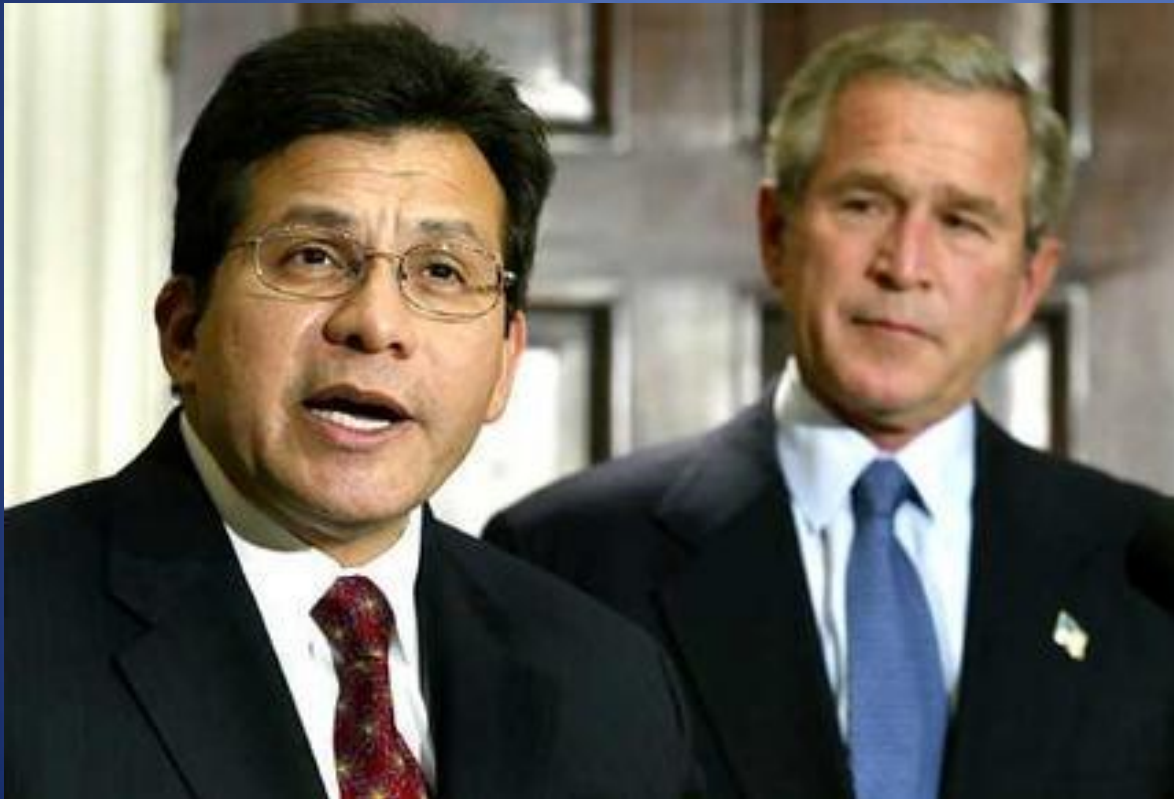
Attorney General John Ashcroft, 2001-2004



A conservative Republican, a Christian evangelical, against abortion, pro-death penalty. **But his own man.** He fought to preserve the independence of the Justice Department.

Attorney General Alberto Gonzales

2005 – July 2007



He owed his career to George Bush. He was the President's man.

Attorney General

Deputy Attorney
General

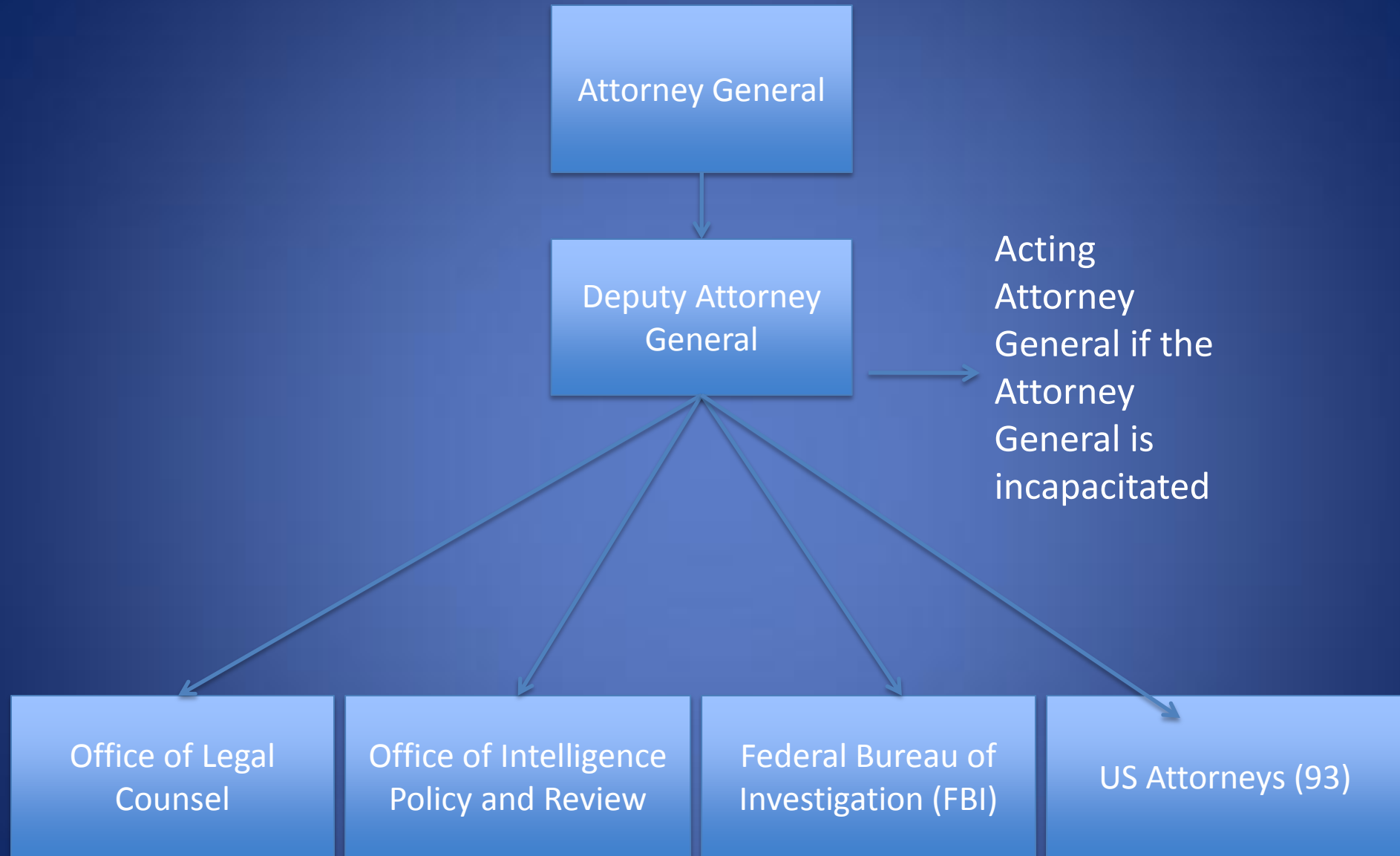
Acting
Attorney
General if the
Attorney
General is
incapacitated

Office of Legal
Counsel

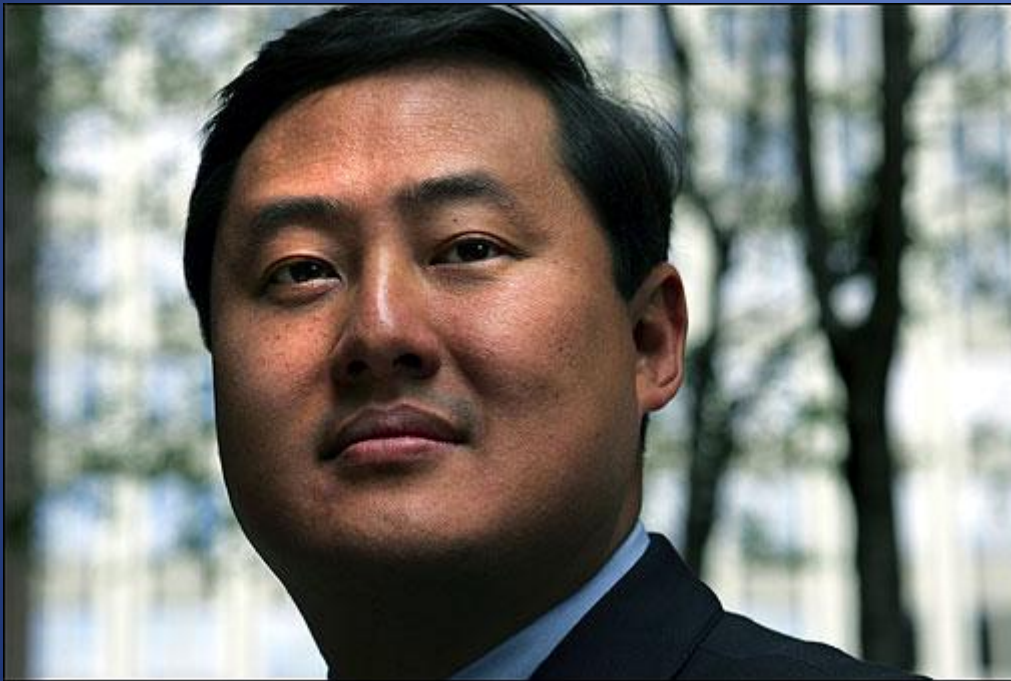
Office of Intelligence
Policy and Review

Federal Bureau of
Investigation (FBI)

US Attorneys (93)



Office of Legal Counsel



John Yoo, one of several Deputy Attorney Generals. He was meant to be reporting to Bybee but his real boss was David Addington, the Vice President's Counsel.



Jay Bybee
Assistant Attorney General

Foreign Intelligence Surveillance Act, 1978 (FISA)

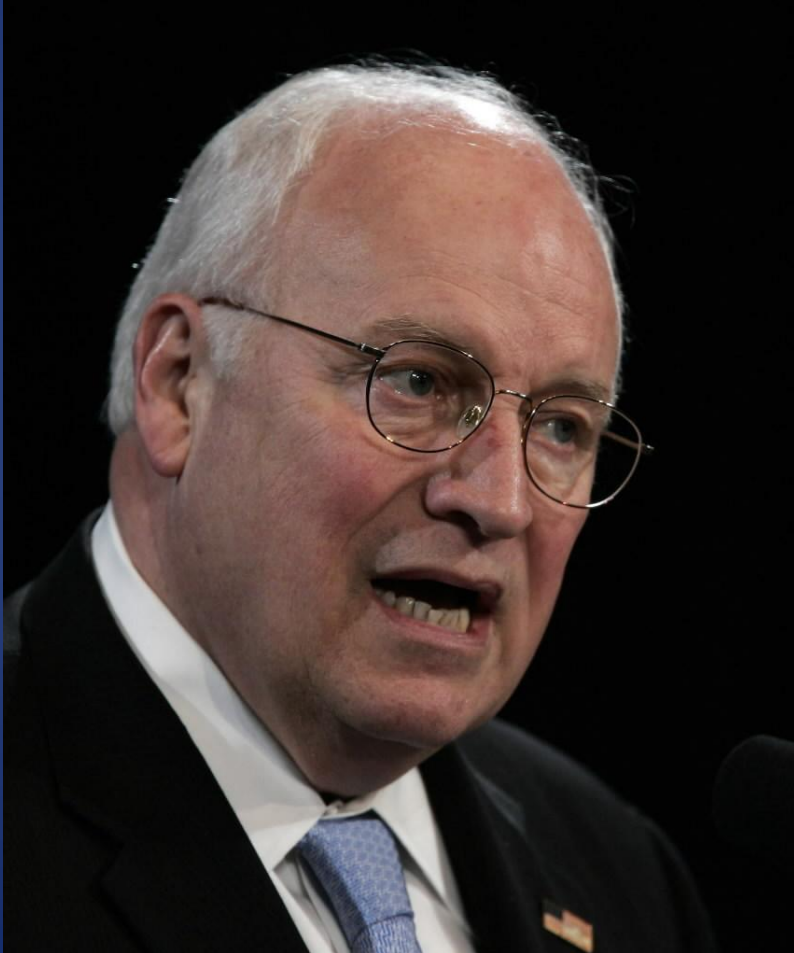
- Enacted by Congress to prevent the Executive Branch from conducting electronic surveillance of a target in the US without judicial authorisation.
- Created a special court to review government wiretap applications and issue warrants.
- Conducting a wiretap without statutory authorisation is a crime punishable by up to five years in prison.

Robert Mueller III

The Senate unanimously confirmed his appointment as FBI Director



“When the Vice President talked, everybody would listen...
He compelled everyone to think carefully about whatever
he mentioned”



Vice President Dick Cheney



David Addington, the VP's counsel and
the first administration lawyer to advocate
“legalising” torture.

Deputy Attorney General James Comey. He becomes Acting Attorney General when John Ashcroft falls ill.



Jack Goldsmith replaces Bybee as head of the Office of Legal Counsel after Ashcroft opposes Yoo's promotion.



A friend of Yoo, he is cut from a different cloth.

Patrick Philbin, who took over Yoo's job,
warned Goldsmith:



“They’re going to
be really mad.
They’re not
going to
understand our
decision.
They’ve never
been told no.”

YOUNGSTOWN SHEET & TUBE CO. V. SAWYER, 343 U. S. 579
(1952), Justice Robert Jackson

“That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety... The opinions of judges, no less than executives and publicists, often suffer the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant. The tendency is strong to emphasize transient results upon policies -- such as wages or stabilization -- and lose sight of enduring consequences upon the balanced power structure of our Republic.

The hospital confrontation according to Jack Goldsmith

“All of a sudden, energy and color came into his face, and he said that he didn’t appreciate them coming to visit him under those circumstances, that he had concerns about the matter they were asking about and that, in any event, he wasn’t the attorney general at the moment; Jim Comey was. He actually gave a two-minute speech, and I was sure at the end of it he was going to die... Mrs. Ashcroft, who obviously couldn’t believe what she saw happening to her sick husband, looked at Gonzales and Card as they walked out of the room and stuck her tongue out at them. She had no idea what we were discussing, but this sweet-looking woman sticking out her tongue was the ultimate expression of disapproval. It captured the feeling in the room perfectly.”

Mueller's notes of the hospital confrontation: Entries 1 and 2

Wednesday, 3/10/04:

@1920: Called by DAG while at restaurant with wife and daughter. He is at AG's hospital with Goldsmith and Philbin. Tells me Card and J. Gonzales are on the way to hospital to see the AG, but that AG is in no condition to see them, much less make decision to authorize continuation of the program. Asks me to come to AG's hospital to witness condition of AG.

@1940: At hospital. Card and J. Gonzales have come and gone. Comey tells me that they saw the AG and were told by the AG that he was in no condition to decide issues, and that Comey was the Acting AG. All matters were to be taken to him, but that he supported the Acting AG's position. The AG then reviewed for them the legal concerns relating to the program. The AG also told them that he was barred from obtaining the advice he needed on the program by the strict compartmentalization rules of the WH. Comey asked me to meet briefly with the AG to see his condition. He also asked that I inform the detail that no visitors, other than family, were to be allowed to see the AG without my consent. (I so informed the detail.)

Mueller's notes of the hospital confrontation:

Entry 3

@2010: Saw AG. Janet Ashcroft in the room. AG in chair; is feeble, barely articulate, clearly stressed.

Excerpt from Comey's draft resignation letter

“Over the last two weeks . . . I and the Department of Justice have been asked to be part of something that is fundamentally wrong. As we have struggled over these last days to do the right thing, I have never been prouder of the Department of Justice or of the Attorney General. Sadly, although I believe this has been one of the institution's finest hours, we have been unable to right that wrong. . . . Therefore, with a heavy heart and undiminished love of my country and my Department, I resign as Deputy Attorney General of the United States, effective immediately.”

Excerpt from Mueller's draft resignation letter

- "[A]fter reviewing the plain language of the FISA statute, and the order issued yesterday by the President ... and in the absence of further clarification of the legality of the program from the Attorney General, I am forced to withdraw the FBI from participation in the program. Further, should the President order the continuation of the FBI's participation in the program, and in the absence of further legal advice from the AG, I would be constrained to resign as Director of the FBI."

The notes for Goldsmith's letter cited as his reasons for resigning:

- the "shoddiness" of the prior Office of Legal Counsel advice;
- the "over-secrecy" of the President's Surveillance Program;
- the "shameful" incident at the hospital.

Condoleezza Rice asked President Bush to see James Comey: “You really need to make sure that you are hearing these folks out.”



What Comey and Mueller told the President

- The President: "I decide what the law is for the executive branch."
- Comey: "That's absolutely true, sir, you do. But I decide what the Department of Justice can certify to and can't certify to, and despite my absolute best efforts, I simply cannot in the circumstances."
- Mueller's log: "I had an independent obligation to the FBI and to the Justice Department to assure the legality of actions we undertook, and that a presidential order alone could not do that."
-

The Whistleblower



Thomas Tamm

NY Times wins Pulitzer Prize for outstanding public service journalism



“I've actually thought quite a bit over the last three years about how I would answer that question if it was ever asked, because I assumed that at some point I would have to testify about it.



Carol Lam, US Attorney for the Southern District of California, fired by Gonzales. She indicted the number 3 man in the CIA for corruption.



US Attorney Paul Charlton was fired for insubordination because he challenged an order to seek the death penalty in a case where the evidence was weak.



The Senate Judiciary Committee's verdict on AG Gonzales's testimony

“The testimony he gave was hard to understand, incredible in a sense -- to say that he was not involved in discussions and not involved in deliberations, when his three top deputies said he was and the documentary evidence supported that. It is the decision of Mr. Gonzales as to whether he stays or goes. But it is hard to see how the Department of Justice can function and perform its important duties with Mr. Gonzales remaining where he is....”